No. 82-991

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF HOME HEALTH AGENCIES, ET AL., PETITIONERS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that 42 U.S.C. 1395kk(a), which authorizes the Secretary of Health and Human Services, in administering the Medicare Program, to "perform any of his functions directly, or by contract * * * as the Secretary may deem necessary," authorizes the Secretary to contract with private fiscal intermediaries to perform the function of reimbursing providers of services under the Medicare Program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 690 F.2d 932. The opinion of the district court (Pet. App. 40a-60a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1982. The petition for a writ of certiorari was filed on December 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Part A of the Medicare Act, 42 U.S.C. (& Supp. V) 1395c-1395i, the Secretary of Health and Human Services is authorized to reimburse health care providers, including home health agencies (HHAs), for the reasonable

cost of providing a variety of inpatient hospital services, post-hospital extended care services, and home health services to Medicare beneficiaries. 42 U.S.C. (& Supp. V) 1395f(a) & (b), 1395x(m), (*o*) & (u). At the Act's inception in 1965, HHAs, like other qualified providers, had the option of nominating a fiscal intermediary to determine the proper amount of reimbursement and to make those payments, pursuant to a cost-reimbursement contract with the Secretary. 42 U.S.C. (Supp. V) 1395h(a). Alternatively, if the provider elected not to nominate an intermediary, it submitted its claims directly to the Secretary, through the Office of Direct Reimbursement (ODR) of the Health Care Financing Administration (HCFA). Under the Act, the Secretary was empowered to perform any of his functions "directly, or by contract." 42 U.S.C. 1395kk(a).

In 1977, Congress acted to limit a provider's right to select a particular intermediary by giving the Secretary the discretionary authority to assign or reassign providers from the intermediary of the provider's choice to another intermediary. The Secretary was also given the discretion to designate a regional or national intermediary for a class of providers. Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. 95-142, 91 Stat. 1199, codified at 42 U.S.C. (Supp. V) 1395h(e)(1)-(3) and 1395h(f). Finally, in 1980, concerned with the "wide variation in administrative and reimbursement practices among intermediaries with respect to home health providers," [1] Congress further amended the Medicare program provisions as they pertained to HHAs. In Section 930(*o*)(4) of the Ominibus Reconciliation Act of 1980, 42 U.S.C. (Supp. V) 1395c, Congress required the Secretary to designate regional intermediaries "to perform

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[1]H.R. Rep. No. 96-1167, 96th Cong., 2d Sess. 368 (1980).

functions * * * with respect to [free-standing] home health agencies[2] * * * in the region," in order to administer the HHA reimbursement process more effectively and efficiently. 42 U.S.C. (Supp. V) 1395h(e)(4).

Following passage of the 1977 amendments to the Medicare Act, the Secretary initiated a proposal to designate intermediaries to serve all freestanding home health agencies on a state-wide basis, in order to lower costs and more effectively protect the HHA reimbursement process against possible fraud or abuse (C.A. App. 46).[3] In August 1981, after receiving comments on the proposal from representatives of the HHA community (C.A. App. 51, 57) and after enactment of the 1980 amendments to the Act, the Secretary approved a plan for designating regional intermediaries (C.A. App. 69). Four months later, on December 8, 1981, the Secretary issued an administrative instruction requiring freestanding HHAs to begin submitting their claims to designated state-wide intermediaries for all Medicare reimbursement determinations and payments (Pet. App. 4a). Of the 864 HHAs that were to be reassigned under the instruction, approximately 54% were providers that previously had chosen to deal directly with the Secretary (*id.* at 4a-5a).

2.a. On December 24, 1981, petitioners—two national associations of HHAs, a corporation that owns and operates 48 HHAs, and 37 individual HHAs—filed the instant action in the United States District Court for the District of Columbia seeking to enjoin the implementation of the Secretary's proposed reassignments. The complaint alleged

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[2]"Freestanding" home health agencies are not affiliated with another provider, such as a hospital, skilled nursing facility, or rehabilitation facility.

[3]"C.A. App." refers to the joint appendix filed in the court of appeals.

that the Secretary's designation of regional intermediaries violated the Medicare Act, the Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment to the Constitution.

On March 10, 1982, the district court ruled in petitioners' favor on most of the issues raised (Pet. App. 40a-61a). The court held that it had jurisdiction over all of petitioners' claims under 28 U.S.C. 1331, notwithstanding the prohibition in 42 U.S.C. 405(h)[4] against the bringing of any action under 28 U.S.C. 1331 to recover on any claim arising under the Medicare Act (Pet. App. 42a-50a). On the merits, the district court held that HHAs have a right under the Medicare Act to deal directly with the Secretary on reimbursement matters. In addition, as to those HHAs that previously had elected to be reimbursed through an intermediary and that the Secretary proposed to reassign to another intermediary, the court prohibited any reassignments from taking effect until the Secretary followed the notice and comment procedures of the Administrative Procedure Act (Pet. App. 57a-61a).

b. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-37a). The court of appeals agreed that the district court had jurisdiction over all of petitioners' claims under 28 U.S.C. 1331 and that this jurisdiction was not expressly barred by 42 U.S.C. 405(h) or implicitly barred by Congress' failure to provide for judicial review of reimbursement reassignment decisions even though it did provide for judicial review with respect to other Medicare determinations (Pet. App. 6a-18a).

On the merits, however, the court of appeals held that the Secretary possessed the authority under the Medicare Act,

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[4]42 U.S.C. 405(h) is applicable to Medicare cases by virtue of 42 U.S.C. 1395ii.

42 U.S.C. 1395kk, to contract out the reimbursement function and thereby, in this case, to require freestanding HHAs to submit their Medicare reimbursement claims to designated regional intermediaries for processing and payment (Pet. App. 8a-31a). In reaching this conclusion, the court noted that an interpretation of 42 U.S.C. 1395kk permitting the Secretary to contract out any of his reimbursement functions is consistent with the generally accepted principle that "a government entity empowered to perform a function has the authority to use any reasonable tools and means to carry out that function" (Pet. App. 20a, citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). The court rejected petitioners' contention that 42 U.S.C. (& Supp. V) 1395g—which provides generally for the Secretary to pay providers of services—grants them an unqualified right to be reimbursed directly by the Secretary, finding instead that that provision "merely requires the Secretary periodically to determine the amount due a provider and to pay that amount at least monthly" (Pet. App. 20a). Accordingly, Section 1395g was held not to limit the Secretary's authority under Section 1395kk to perform this function "directly, or by contract * * *."

The court of appeals found its conclusion that Section 1395kk authorizes the Secretary to contract out his reimbursement responsibilities "bolstered" by the legislative history of the Act (Pet. App. 20a-21a). In contrast, the court found that the portions of the legislative history cited by petitioners pertained not to the contracting authority in Section 1395kk but instead to Section 1395h(d), which in effect provides that a member of an association of providers cannot be bound by that association's choice of a particular intermediary (Pet. App. 23a-25a). These passages from the legislative history, the court concluded, in no way intimate that the *Secretary* cannot make such a choice (*id.* at 24a).

Finally, the court of appeals rejected petitioners' contention that the Secretary's authority to contract out the reimbursement function was barred by a 1966 opinion of an Assistant General Counsel of the Department of Health, Education, and Welfare or by the Secretary's prior practice of permitting direct dealing (Pet. App. 28a-31a):

> The Secretary's authority to contract out his reimbursement responsibilities did not dwindle away over time as he chose not to use it. Congress conferred that authority upon the Secretary and only Congress could withdraw it. Neither the Office of General Counsel by its opinions, nor the Secretary by his inaction could diminish that authority in the least.

Id. at 31a. The court also noted that the opinion of the General Counsel's Office did not take into account the legislative history of the 1966 Act that supports the Secretary's authority to contract out the reimbursement function (*id.* at 30a).

Although the court of appeals concluded that the Secretary had the statutory authority to contract out the reimbursement function, it held that the Secretary was required to follow the notice and comment procedures of the APA before assigning HHAs to intermediaries. The court therefore held that the Secretary may not reassign petitioners to intermediaries until he provides adequate notice and an opportunity for comment (Pet. App. 31a-37a).

ARGUMENT

The court of appeals has sustained the Secretary's authority, expressly granted by the Medicare Act itself and confirmed by the legislative history of that Act, to perform the function of reimbursing providers through intermediaries with which he has contracted. This holding is correct, does not conflict with any decision of this Court or any

court of appeals, and presents no issue warranting further review.

1. The court of appeals correctly held that the Medicare Act empowers the Secretary to contract out the function of reimbursing providers under Part A of the Act and thereby to require freestanding HHAs to submit their reimbursement claims to fiscal intermediaries rather than directly to the Secretary. The Secretary is explicitly authorized by the Medicare Act to "perform any of his functions * * * directly, or by contract providing for payment in advance or by way of reimbursement * * * as the Secretary may deem necessary." 42 U.S.C. 1395kk(a). This broad language, on its face, surely encompasses the contracting out of the Secretary's reimbursement responsibilities, the most routine of his duties under the Act and a function that private contractors, such as insurance carriers, are especially well suited to perform. As this Court often has recognized, language as plain and direct as this "must ordinarily be regarded as conclusive" in the absence of a "clearly expressed legislative intention to the contrary." *Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1481 (Mar. 8, 1982), slip op. 3, citing *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

Here, far from expressing a contrary intention, the legislative history makes clear that Congress specifically intended that the Secretary could contract out the reimbursement function pursuant to 42 U.S.C. 1395kk even where the provider had declined to nominate a particular intermediary and thus would otherwise be reimbursed directly by the Secretary. The Senate Finance Committee's report on the Act states:

> Under the [proposed bill], nominated organizations having experience with cost reimbursement could determine the amount of payments and make such

> payments whether under part A or part B. *In the absence of a suitable nominated organization, the Secretary could contract out all or part of this service or handle the function directly.*

S. Rep. No. 404, 89th Cong., 1st Sess. 53 (1965) (emphasis added). See also H.R. Rep. No. 213, 89th Cong., 1st Sess. 174 (1965).[5]

2. Petitioners contend (Pet. 7-8) that the court of appeals' holding that the Secretary may contract out any of his functions under the Medicare Act could lead to a "drastic change" in the way in which the Medicare program is administered. Petitioners even suggest that the decision below would permit the Secretary to contract to private parties his statutory duties of serving as a member of the Board of Trustees of the Part A and Part B Trust Funds (see 42 U.S.C. (& Supp. V) 1395i(b) and 1395t(b)), establishing the amount of premiums Part B beneficiaries must pay (42 U.S.C. (& Supp. V) 1395r), and appointing the members of the Provider Reimbursement Review Board (42 U.S.C. 1395*oo*(a)).

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[5]Petitioners' reliance on other portions of the legislative history of the Medicare Act and amendment thereto (Pet. 10 & n.11) is misplaced. As the court of appeals noted (Pet. App. 22a-28a), all but one of the passages invoked by petitioners pertain to 42 U.S.C. 1395h(d), which merely states that a provider is not bound by the selection of a particular intermediary by an association to which the provider belongs. The fact that a provider is not bound by its association's choice of an intermediary does not suggest that a provider is not bound by the *Secretary's* decision to contract out part of the reimbursement function.

The remaining passage of the legislative history cited by petitioners (Pet. 10) again pertains not to Section 1395kk but instead to a 1980 amendment requiring the Secretary to designate regional intermediaries for freestanding HHAs. The passage quoted indicates only that the Secretary would remain free to deal directly with freestanding HHAs if *he* elected to do so (see Pet. App. 25a-26a, 28a).

There is no need to speculate about the validity of these far-fetched examples. All that this case involves—and all that the court of appeals' opinion addresses—is the Secretary's authority to enter into contracts for the determination and payment of reimbursement claims by intermediaries rather than by the Secretary. The Act on its face contemplates that the reimbursement functions under Part A and Part B may be performed by private insurance carriers and similar entities pursuant to contract with the Secretary, and the reimbursement function in fact typically is performed by such entities. See 42 U.S.C. (& Supp. V) 1395h and 1395u; *Schweiker* v. *McClure*, 456 U.S. 188 (1982); *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982). The court of appeals' sustaining of the Secretary's authority to enter into contracts with intermediaries for the reimbursement of petitioners therefore scarcely represents a "drastic change" in the way the Medicare program is administered.[6]

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[6]Petitioners assert (Pet. 8) that the decision below conflicts with *St. Louis University* v. *Blue Cross Hospital Service*, 537 F.2d 282, 293 (8th Cir.), cert. denied, 429 U.S. 977 (1976), where the Eighth Circuit held that the Secretary must retain sufficient power to review intermediary determinations in reimbursement disputes to assure compliance with Medicare statutes and regulations. Petitioners contend that under the rationale of the decision below, the Secretary could contract out the very function that the Eighth Circuit held in *St. Louis University* must be retained. This contention is without merit.

This case involves only the authority of the Secretary to perform the reimbursement function by contract under Section 1395kk, not to contract away his final authority for construing the Act. Section 1395kk was not at issue in *St. Louis University*. Moreover, in that case, the initial reimbursement determinations *were* made by intermediaries. The Eighth Circuit's decision involved only the degree of control the Secretary must retain over the operations of intermediaries, an issue not raised here. In any event, the Eighth Circuit's concerns about the use of intermediaries have been dispelled by this Court's decision in *Schweiker* v. *McClure, supra*, sustaining the authority of Congress to vest final decision-making authority in reimbursement disputes in private insurance carriers serving as intermediaries.

3. Nor does the Secretary's previous practice of reimbursing directly those providers that had not nominated an intermediary foreclose the Secretary from deciding in light of current circumstances that this function now should be performed by contract in the case of certain providers, such as freestanding HHAs. As the court of appeals observed, quoting this Court's decision in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648 (1950), powers granted by Congress "are not lost by being allowed to lie dormant" (Pet. App. 30a).

Petitioners contend (Pet. 9) that over a period of 15 years there has been a consistent administrative interpretation of the statute as furnishing providers a right to elect to be reimbursed directly by the Secretary. The only document cited by petitioners that focused on this question, however, is a 1966 opinion of an Assistant General Counsel of HEW. As the court of appeals noted (Pet. App. 30a), subsequent opinions issued by the same Office have taken a contrary view. Moreover, the 1966 opinion itself did not take into account the legislative history of the Act, quoted above, that specifically states that the Secretary may contract out all or part of the reimbursement function if a provider does not nominate a suitable organization to perform that function. See pages 7-8, *supra*. The court of appeals correctly observed (Pet. App. 29a n.87) that the regulations cited by petitioners (Pet. 9)[7] reflect only the past practice pursuant to 42 U.S.C. 1395h, under which a provider had been permitted to elect to deal either with an intermediary or with the Secretary. The regulations do not address the distinct authority of the Secretary under Section 1395kk to perform the reimbursement function "directly, or by contract * * *."[8]

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[7]42 C.F.R. 421.103 and 421.104(b)(2).

[8]Petitioners' concerns (Pet. 4-5) regarding the degree to which any incremental costs of dealing with intermediaries rather than directly with the Secretary will be reimbursed by Medicare are misplaced in the

Finally, contrary to petitioners' contention (Pet. 14-15), the decision below is consistent with the principles of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). In *Chenery*, this Court held (*id.* at 88) that where an agency order is predicated on a "determination of policy or judgment which the agency alone is authorized to make and which it has not made," a reviewing court may not sustain the order on other, alternative grounds. This rule, designed to prevent appellate courts from "intrud[ing] upon the domain which Congress has exclusively entrusted to an administrative agency" (*ibid.*), is inapplicable to the instant case. Here, the Secretary plainly had made the policy choice to contract out the reimbursement function. The issue addressed by the court of appeals was not the merits of the Secretary's reassignment decision, but whether he had the authority, under the Medicare Act, to make such reassignments. In these circumstances, the court of appeals' reliance on the contracting authority in 42 U.S.C. 1395kk, a Section that was not identified in the Secretary's administrative instruction, was not improper under *Chenery*, since it did not cause the court to make policy judgments entrusted to the Secretary alone. Accordingly, the court of appeals' ruling does not conflict with this Court's prior decisions.[9]

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instant suit. A judicial challenge to a reimbursement decision may be brought only pursuant to 42 U.S.C. (& Supp. V) 1395*oo*, and then only after a claim for reimbursement has been presented to and denied by the intermediary and the Provider Reimbursement Review Board.

[9]The court of appeals held (Pet. App. 6a-18a) that the district court had jurisdiction to consider petitioners' claims under 28 U.S.C. 1331, notwithstanding the bar in 42 U.S.C. 405(h) (as incorporated into the Medicare Act by 42 U.S.C. 1395ii) to the bringing of any action under 28 U.S.C. 1331 to recover on a claim arising under the Medicare Act. See *Weinberger* v. *Salfi*, 422 U.S. 749, 756-762 (1975); cf. *United States* v. *Erika, Inc.*, No. 81-1594 (Apr. 20, 1982). The correctness of this jurisdictional holding would be presented as a threshold matter if the Court were to grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

DOJ-1983-01